



COMPETITION LAW
(2785 - 1992)

P.S. Crampton
E.P. Apps
(Stikeman, Elliott)

REQUIRED READINGS

These materials are distributed for research and instructional purposes only. They are for the exclusive use of students taking Competition Law (2785) at the Faculty of Law, University of Toronto and are not to be considered published.

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UNIVERSITY OF TORONTO

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P.S. Crampton
E.P. Apps

REQUIRED READINGS

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1. Director of Investigation and Research, <u>Competition Act, Program of Compliance</u> , No. 3, June, 1989.	1
2. Crampton, P., <u>Mergers and the Competition Act</u> . Toronto: Carswell, 1990. Chapter 3.	16
3. Crampton, <u>ibid</u> , Chapter 4.	43
4. Stikeman, Elliott, <u>Competition Act Merger Guidelines</u> , (October 1991).	81
5. Dunlop, B., McQueen, D., and Trebilcock, M. <u>Canadian Competition Policy - A Legal and Economic Analysis</u> , Toronto: Canada Law Book, 1987, pp. 111-151.	101
6. <u>R. v. Nova Scotia Pharmaceutical Society et al.</u> (1990), 32 C.P.R. (3d) 259; rev'd (1991), 36 C.P.R. (3d) 173 (N.S.C.A.).	123
7. <u>R. v. Canadian General Electric Company, et al.</u> , (1976), 34 C.C.C. (2d) 489 (Ont. H.C.). (Read pp. 500-535).	152
8. <u>Atlantic Sugar Refineries Co. Ltd. et al v. A.G. Can.</u> (1980), 115 D.L.R. (3d) 21 (S.C.C.).	176
9. <u>The Queen v. Kent County Law Association et al.</u> (1988), Admissions and Order of Prohibition.	190
10. <u>The Queen v. Ogilvie Mills Ltd. et al.</u> , (1990), Agreed Statement of Facts and Order of Prohibition.	204
11. <u>The Queen v. Air Products Canada Ltd. et al.</u> (1991), Plea and Sentence.	217
12. <u>The Queen v. R.L. Crain Inc. et al.</u> (1988), Statement of Facts.	234
13. Anderson, R.D. and Khosla, S.D., "Recent Developments in the Competition Policy Treatment of Resale Price Maintenance", <u>Canadian Competition Policy Record</u> , vol. 6, no. 4, (1985), pp.1-14.	251
14. <u>R. v. Shell Canada Products Limited</u> (1989), 24 C.P.R. (3d) 501 (Man. Q.B.); (1989), 25 C.P.R. (3d) 101 (Sent'g); aff'd (1990), 75 C.R. (3d) 365 (C.A.).	265
15. Director of Investigation and Research, <u>Price Discrimination Discussion Paper</u> (July 1990).	280
16. Director of Investigation and Research, <u>Predatory Pricing Enforcement Guidelines</u> (Draft, Fall 1991).	325
17. Zaid, F., and Schumacher, T., "Price Discrimination and Promotional Allowances". (Paper prepared for the Canadian Bar Association - Ontario, 1984 Annual Institute on Continuing Legal Education), pp.22-29.	340
18. Dunlop et al, <u>supra</u> , pp.248-9, 253-65 and 271-9.	350

19. Director of Investigation and Research v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1 (Comp. Trib.); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.). 367
20. Director of Investigation and Research v. Bombardier Ltd. (1980), 53 C.P.R. (2d) 47 (R.T.P.C.). 385
21. Director of Investigation and Research, BBM Bureau of Measurement (1981), 60 C.P.R. (2d) 26 (R.T.P.C.). 394
22. Crampton, supra, pp.555-572 and 592-655. 400
23. Director of Investigation and Research v. Nutrasweet Co.; Tosoh Canada Ltd., Intervener (1990), 32 C.P.R. (3d) 1 (Comp. Trib.). 443
24. Director of Investigation and Research v. Laidlaw Waste Systems Ltd., (Application). 481
25. Goldman, C.S., "The Competition Act as it Relates to the Regulated Sector", Notes for an Address to the Canadian Association of Members of Public Utility Tribunals. (Saskatoon, September 10, 1986). pp. 23-36. 506
26. Hogg, P.W. Constitutional Law of Canada (2nd. ed.), 1985, Toronto: Carswell, pp. 406-409, and 447-452. 523
27. General Motors of Canada Ltd. v. City National Leasing et al., (1989), 58 D.L.R. (4th) 255 (S.C.C.). 530
28. Alex Couture Inc. et al v. A.G. Can.; Competition Tribunal et al. (1990), 30 C.P.R. (3d) 486 (Que. S.C.). 549
29. Director of Investigation and Research, Misleading Advertising Guidelines, (Special Edition 1991). 573

COMPETITION LAW (2788 1992): SYLLABUS

P.S. Crampton 869-5567
E.P. Apps 869-5593
(Stikeman, Elliott)

Note: Evaluation in this seminar course will be based upon an evaluation of a written term paper of approximately 30 pages in length (75%), or an exam (75%), and class participation (25%). In the alternative, an exam and a term paper may be written, (in which case each will account for 37.5% of the final mark, and class participation will account for the remaining 25%). Students are expected to read the weekly required readings prior to the course. Recommended readings are optional, and are on reserve in the library.

WEEK I. INTRODUCTION: The Competition Act - Its provisions,
(Jan. 9) administration and enforcement.

- overview of the course.
- goals of Canadian competition policy.
- review of Competition Act.
- the Director and his role.
- the Bureau of Competition Policy.
- the Director's Compliance Program.
- the inquiry process.
- the Competition Tribunal

Required reading:

- Competition Act. (To be distributed in class. Read sections 1 to 24, and flip through the rest).
- Director of Investigation and Research, Competition Act, Annual Report for the year ended March 31, 1990, pp. 1-45. (To be distributed in class).
- Director of Investigation and Research, Competition Act, Program of Compliance, No. 3, June, 1989.

Recommended reading:

- Consumer and Corporate Affairs, Competition Law Amendments: A Guide (December 1985).
- Hunter, L.A.W., "The New Merger Provisions of the Competition Act - Certainty or a Random Walk?", Canadian Competition Policy Record, (December 1987) vol. 8 no. 4, pp. 58-67.
- Fox, E., "Antitrust, Economics, and Bias". Antitrust, (Winter 1988) pp. 6-10.
- Strayer, Hon. B.L., "The New Competition Tribunal", Notes for an address to a conference on Canada's New Competition Law organized by the Gordon Group, (Toronto, March 31, 1987).

WEEK II THE CONCEPT OF COMPETITION
(Jan. 16)

- "perfect", "workable" and "monopolistic" competition.
- competition as a process.
- the economic costs of monopolistic, collusive and restrictive behaviour.

Required reading:

- Crampton, P., Mergers and the Competition Act, Toronto: Carswell, 1990, Chap. 3.

Recommended reading:

- Posner, R. Antitrust Law: An Economic Perspective, Chicago: University of Chicago Press, 1976, pp. 8-22 and 237-243.
- Gilbert, "Competition as an Economic Model", Antitrust, (1988) pp. 90-105.

WEEK III THE NOTION OF RELEVANT MARKET

(Jan. 23)

- overview of the product, geographic and temporal dimensions.
- "cross-elasticity", "substitutability" and "reasonable interchangeability".
- the "hypothetical monopolist".
- evaluative criteria.

Required reading:

- Crampton, supra, Chapter 4.
- Stikeman, Elliott, Competition Act Merger Guidelines, (October, 1991) pp.4-8.

Recommended reading:

- United States v. E.I. du Pont de Nemours and Company, [1956] CCH Trade Regulation Reports, p.71,585 (S. Ct.).
- J.W. Mills & Son Limited, et al, [1968] 2 Ex. C.R. 275. (Read pp. 304-308).
- United States v. Continental Can Co. et al, [1964] CCH Trade Regulation Reports, p.79,517. (U.S. S.Ct.)
- Director of Investigation and Research, Press Release and Backgrounder re: the acquisition of the assets of Domglass Inc. by Consumers Packaging Inc., (NR-10188, April 25, 1989).
- Canadian Competition Policy Record "Market Definition Brings Acquittal for Toronto Druggists on Conspiracy Count", vol. 6 no. 1, (March, 1988), pp. 20-25.

WEEK IV CONSPIRACY IN RESTRAINT OF TRADE I

(Jan.30)

- the elements of an agreement.
- preventing or lessening competition "unduly".
- conscious parallelism and oligopoly theory.

Required reading:

- Dunlop, B., McQueen, D., and Trebilcock, M. Canadian Competition Policy - A Legal and Economic Analysis, Toronto: Canada Law Book, 1987, pp. 111-151.
- R. v. Nova Scotia Pharmaceutical Society et al. (1990), 32 C.P.R. (3d) 259; rev'd (1991), 36 C.P.R. (3d) 173 (N.S.C.A.).

Recommended reading:

- Howard, J.L., and Stanbury, W.T. "Market Power: The Case of Conscious Parallelism". (Paper prepared for the 1988 Fraser Institute/University of Toronto

Symposium Economic Competition and the Law, (June 23-25).

- Posner, R., Antitrust Law: An Economic Perspective, Chicago: Univ. of Chicago Press, 1976, pp. 39-77.

Week V
(Feb. 6)

CONSPIRACY IN RESTRAINT OF TRADE II

- bid rigging.
- case studies.
- film: "Someone is Watching".

Required reading:

- R. v. Canadian General Electric Company, et al., (1976), 34 C.C.C. (2d) 489 (Ont. H.C.). (Read pp. 500-535).
- Atlantic Sugar Refineries Co. Ltd. et al v. A.G. Can. (1980), 115 D.L.R. (3d) 21 (S.C.C.).
- The Queen v. Kent County Law Association et al. (1988), Admissions and Order of Prohibition.
- The Queen v. Ogilvie Mills Ltd. et al. (1990), Agreed Statement of Facts and Order of Prohibition.
- The Queen v. Air Products Canada Ltd. et al. (1991), Plea and Sentence.
- The Queen v. R.L. Crain Inc. et al. (1988), Statement of Facts.

Recommended reading:

- Howard Smith Paper Mills Limited et al, (1957) S.C.R. 403.
- Aetna Insurance Co. et al. v. The Queen (1977), 75 D.L.R. (3d) 332 (S.C.C.).
- R. v. Anthes Business Forms Ltd. et al., (1975), 26 C.C.C. (2d) 349 (O.C.A.).

WEEK VI
(Feb. 13)

PRICING OFFENCES

- retail price maintenance
- price discrimination
- promotional allowances
- predatory pricing

Required reading:

- Anderson, R.D. and Khosla, S.D., "Recent Developments in the Competition Policy Treatment of Resale Price Maintenance", Canadian Competition Policy Record, vol. 6, no. 4, (1985), pp.1-14.
- R. v. Shell Canada Products Limited (1989), 24 C.P.R. (3d) 501 (Man. Q.B.); (1989), 25 C.P.R. (3d) 101 (Sentencing); aff'd (1990), 75 C.R. (3d) 365 (C.A.).
- Director of Investigation and Research, Price Discrimination Discussion Paper (July 1990).
- Director of Investigation and Research, Predatory Pricing Enforcement Guidelines (Draft, Fall 1991).
- Zaid, F., and Schumacher, T., "Price Discrimination and Promotional Allowances". Paper prepared for the Canadian Bar Association - Ontario, 1984 Annual Institute on Continuing Legal Education, pp.22-29.

Recommended reading:

- Dunlop et al, supra, pp. 207-253 and 264-271.

- Regina v. Moffats Ltd., (1957), 118 C.C.C. 4 (O.C.A.).
- R. v. William E. Coutts Co. Ltd. (1968), 67 D.L.R. (2d) 87 (O.C.A.).
- R. V. Consumers Glass Co. et al. (1981), 33 O.R. (2d) 228 (H.C).
- R. v. Carnation Co. Ltd., (1969), 4 D.L.R. (3d) 133 (Alta. C.A.).

WEEK VII **VERTICAL RESTRAINTS**
(Feb. 27)

- refusal to deal.
- consignment selling
- exclusive dealing.
- tied selling.
- market restriction.

Required reading:

- Dunlop et al, supra, p.248-9, 253-65 and 271-9.
- Director of Investigation and Research v. Chrysler Canada Ltd (1989), 27 C.P.R. (3d) 1 (Comp. Trib.); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.).
- Director of Investigation and Research, Bombardier Ltd. (1980), 53 C.P.R. (2d) 47 (R.T.P.C.).
- Director of Investigation and Research v. Nutrasweet Co.; Tosoh Canada Ltd., Intervener (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), pp.52-58.
- Director of Investigation and Research v. BBM Bureau of Measurement (1981), 60 C.P.R. (2d) 26 (R.T.P.C.).

Recommended Reading:

- Director of Investigation and Research v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

WEEK VIII **MERGERS I**
(Mar. 5)

- substantial prevention or lessening of competition, market power and the public interest.
- evaluative criteria.
- the efficiency exception.

Required reading:

- Stikeman, Elliott, Competition Act Merger Guidelines, supra.

Recommended reading:

- Crampton, supra, Chapters 5-7, (on reserve in library).
- Macdonald, W. and Rowley, W., "Toward a Realistic Policy on Mergers", Canadian Competition Policy Record, vol. 9, no. 1, (March, 1988), pp. 68-69.
- Stanbury, W.T. "Reply to Macdonald and Rowley on Merger Policy", ibid, pp.70-75.

WEEK IX **MERGERS II**
(Mar. 12)

- the program of compliance.
- prenotification
- advance ruling certificates.
- the merger review process.
- alternative remedies and approaches.
- case studies.

Required reading:

- Crampton, supra, pp.555-572 and 592-655.

Recommended reading:

- Salop, S. and Simons, J. "A practical guide to merger analysis". Antitrust Bulletin, vol. 29, (1984), pp. 663-703.
- Panel Discussion, "The Nuts and Bolts of Structuring and Defending Acquisitions", Antitrust, (Fall, 1986), vol. 1, no. 1, pp. 18-20.

WEEK X
(Mar. 19)

ABUSE OF DOMINANCE

- the notion of dominance.
- anticompetitive acts.
- the intent requirement.
- the "practice" requirement.
- preventing or lessening competition substantially.
- superior competitive performance.

Required reading:

- Director of Investigation and Research v. Nutrasweet Co; Tosoh Canada Ltd., Intervener, supra, pp.1-52 and 57-8.
- Director of Investigation and Research v. Laidlaw Waste Systems Ltd., (Application).

Recommended reading:

- McDonald, B.C., "Abuse of Dominant Position", Canadian Competition Policy Record, vol. 8, no. 1, (March 1987), pp. 59-75.
- Anderson, R.D. and Khosla, S.D., "Reflections on McDonald on Abuse of Dominant Position", Canadian Competition Policy Record, vol. 8, no. 3 (Sept. 1987), pp. 51-60.
- Martin, Roger L., "Abuse of Dominance or Abuse of Reason?", Canadian Competition Policy Record, vol. 8, no. 3 (Sept. 1987), pp. 61-67.

WEEK XI
(Mar. 26)

REGULATED CONDUCT, PRIVATE ACTIONS AND CONSTITUTIONAL ISSUES

- federal and provincial regulation.
- "involuntary" and "voluntary" conduct.
- regulatory forbearance.
- the impact of deregulation.
- private actions.
- the trade and commerce power.
- impact of the Charter of Rights

Required reading:

- Goldman, C.S., "The Competition Act as it Relates to the Regulated Sector", Notes for an Address to the Canadian Association of Members of Public Utility Tribunals. (Saskatoon, September 10, 1986). pp. 23-36.
- Hogg, P.W. Constitutional Law of Canada (2nd. ed.), 1985, Toronto: Carswell, pp. 406-409, and 447-452.

- General Motors of Canada Ltd. v. City National Leasing et al., (1989), 58 D.L.R. (4th) 255 (S.C.C.).
- Alex Couture Inc. et al v. A.G. Can.; Competition Tribunal et al. (1990), 30 C.P.R. (3d) 486 (Que. S.C.).
- Director of Investigation and Research v. Nutrasweet Co; Tosoh Canada Ltd., Intervener, supra, pp.58-75.

Recommended reading:

- Janisch, H. "Competition in Telecommunications: Who Polices the Transition", Ottawa Law Review, vol. 18, no. 3, (1986), pp. 628-657.
- Goldman, C.S. "The Competition Act and the Professions". Notes for an Address to the Canadian Bar Association (Ontario) Program on the Professions (Toronto, April 25, 1989).
- Wetston, H.I., "Deregulation and the Protection of Competition: Implications for Energy Trade", Notes for an Address to the American Bar Association Third Annual Conference on Canada/U.S. Trade in Energy, Montreal, May 19, 1988.

WEEK XII MARKETING PRACTICES AND COURSE OVERVIEW
(Apr. 2)

- misleading advertising
- misleading representations and testimonials
- double ticketing
- pyramid selling
- referral selling
- bait and switch selling
- sale above advertised price
- promotional contests

Required Reading

- Director of Investigation and Research, Misleading Advertising Guidelines, (Special Edition 1991).

Recommended reading:

- Bureau of Competition Policy, (Marketing Practices Branch) Misleading Advertising Bulletin: Revised Reprint of Selected Articles from Past Issues (January 1976 to December 1984).
- Fox, E.M. and Sullivan, L.A., "Antitrust-Retrospective and Prospective: Where are we Coming from? Where are we Going?" New York Univ. L.R., Vol. 62, (1987) pp.936-968.

WEEK XIII REVIEW

- No required readings.